



UNITED STATES DEPARTMENT OF EDUCATION

October 31, 2019

CJ Ciaramella
MuckRock
Dept. MR 36163
411A Highland Avenue
Somerville, MA 02144

Re: Appeal No. 19-00026-A/FOIA Request No. 18-02747-F

Dear CJ Ciaramella:

I am writing in response to your email dated February 8, 2019, appealing the U.S. Department of Education's (Department's) March 6, 2019, decision to deny your January 31, 2019, request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and its implementing regulations at 34 C.F.R. Part 5.

Background

You requested "the memo submitted to the White House Office of National Drug Control Policy's Marijuana Policy Coordination Committee regarding the negative impacts of marijuana legalization and increased use." By letter dated January 31, 2019, the Office of Elementary and Secondary Education (OESE) identified two pages of records responsive to your request. OESE withheld both pages in full pursuant to 5 U.S.C. §§ 552 (b)(5) (FOIA Exemptions 5). Your appeal ensued.

Determination on Appeal

Based on a careful review of the correspondence between the parties, the information at issue in your appeal, and applicable legal precedent, I have decided to deny your appeal. The reasons for my determination are discussed below.

Discussion

Your appeal argues that "the Department has not satisfied its burden of demonstrating that the responsive documents are wholly exempt from disclosure under Exemption 5." You argue that "the Department is required to produce any "reasonably segregable" portions of the withheld pages."

Exemption 5

You assert on appeal that to qualify for FOIA's deliberative process privilege, an agency must demonstrate, not simply declare, that the withheld documents are both pre-decisional and deliberative. To qualify for Exemption 5 protection, a government document "must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation

against the agency that holds it.” *Dep’t of the Interior v. Klamath*, 532 U.S. 1, 8 (2001). For the deliberative process privilege to apply, an inter- or intra-agency communication must be both predecisional and deliberative. *Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993). A document is predecisional if it was “generated before the adoption of an agency policy” and deliberative if it reflects the “give-and-take of the consultative process.” *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). To satisfy the “deliberative” prong, the records must be “a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

After reviewing the record in question, I have determined that OESE properly withheld the document under Exemption 5. The document is predecisional in that the information was solicited by a senior White House advisor, and the document was created before the adoption of a policy on marijuana by the White House. The document is also deliberative, as it contains the Department’s views and concerns regarding marijuana use, production, and trafficking, which may be considered by the Committee or the White House in developing U.S. drug policy. *See Bureau of Nat’l Affairs v. U.S. Dep’t of Justice*, 742 F.2d 1484, 1497 (D.C. Cir. 1984) (finding that the agency’s recommendations to OMB concerning the development of proposed legislation to be submitted to Congress was predecisional because, while the agency made a final decision concerning the substance of the recommendation made to OMB, the final decision regarding the proposed legislation rested with OMB). You also argue that the Department failed to state the harm that would result from the disclosure of the document. The release of the information would have a chilling effect on open and frank discussions between agencies and the White House. *See, Wolfe v. Dep’t of Health and Human Serv.*, 839 F.2d 768 (D.C. Cir. 1988) (one of the purposes of the deliberative process privilege is to protect subordinates’ willingness to provide decision-makers with frank opinions and recommendations). Accordingly, I have determined that OESE properly withheld this information because it is protected from disclosure under Exemption 5.

You further argue that the Department is required to produce any reasonably segregable portions of the withheld pages. Although FOIA generally requires factual material to be segregated and released from exempt material, when factual material is so intertwined with exempt material that it cannot be adequately segregated and extracted, it need not be released. After a careful review of the document at issue, I have determined that the factual material contained herein is so intertwined with material protected by Exemption 5 that separating them would harm the deliberative process.

Conclusion

For these reasons, I am denying your appeal.

Notice of Other Rights

You have the right to seek assistance and/or dispute resolution services from the Department’s FOIA Public Liaison or the Office of Government Information Services (OGIS). The FOIA Public Liaison is responsible, among other duties, for assisting in the resolution of FOIA disputes. OGIS,

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which is outside the Department of Education, offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation.

They can be contacted by:

Mail	FOIA Public Liaison Office of the Executive Secretariat U.S. Department of Education 400 Maryland Ave., SW Washington, DC 20202-4536	Office of Government Information Services National Archives and Records Administration 8601 Adelphi Road Room 2510 College Park, MD 20740-6001
E-mail	robert.wehausen@ed.gov	OGIS@nara.gov
Phone	202-205-0733	301-837-1996; toll free at 1-877-684-6448
Fax	202-401-0920	301-837-0348

If you are dissatisfied with my action on your appeal, you may file a lawsuit in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,



Tracey St. Pierre
Chief FOIA Officer